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ABSTRACT

This chapter reviews litigation in higher education for 1986. The first section discusses the relationship between postsecondary institutions and various governmental agencies, in which litigation covers questions on the authority of boards, access to information through sunshine laws, questions of tax exempt status, and issues of accreditation. The second major section is devoted to litigation relating to employees of postsecondary institutions. These include questions of discrimination in employment, rights of nontenured faculty, personnel actions against tenured faculty, litigation involving administrators and staff, and collective bargaining decisions. The next section discusses litigation construing the rights and responsibilities of postsecondary students, in cases relating to admissions, nonresident tuition, financial aid, First Amendment rights, dismissal, and other constitutional issues. Liability of postsecondary institutions is covered next, in cases arising from personal injury, workers' compensation claims, contract liability, deceptive practices, educational malpractice, and negligence. The last section discusses an antitrust suit brought against a university. (TE)

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HIGHER EDUCATION

Robert M. Hendrickson*

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*Morgan M. Laury, doctoral student and graduate assistant in the Higher Education Program, assisted in the preparation of this chapter.

INTRODUCTION

This year's litigation is again voluminous, but the number of cases is down slightly from last year. The Supreme Court ruled on two state discrimination cases, finding that racial discrimination still existed in the way the state higher education systems were structured. In addition, the Court ruled that discrimination prior to the passage of title VII could be considered as a factor in a salary disparity case. The Court also granted *certiorari* on the question of whether an Arab-American was a racial group under title VII. Finally, the Court ruled on financial aid to a blind student attending a private, religiously affiliated college.

Cases involving termination of tenured faculty for cause increased this year, as did financial exigency cases, and questions of nonrenewal or denial of tenure continued to receive attention. A number of institutions litigated whether certain fringe benefits would be considered wages subject to income tax.

Student litigation this year focused again on first amendment issues. Cases involving loan default continued to be heavy. Academic dismissal litigation showed a substantial increase this year, and focused on graduate and professional students.

Liability issues continued to receive attention in the courts. Several deceptive practice cases, involving both foreign and local institutions, were litigated in 1986.

INTERGOVERNMENTAL RELATIONS

This section deals with the relationship between postsecondary institutions and various governmental agencies. Litigation ranges from

questions on the authority of boards, access to information through sunshine laws, questions of tax exempt status, and issues of accreditation.

Several cases challenge the authority of boards in decision making. The lead case involves the issue of divestment. Students sought to enforce the State Board of Higher Education's resolution instructing the Oregon Investment Council (OIC) to cease purchasing common stock in corporations doing business in South Africa.[1] The court noted that OIC was not controlled by the State Board of Higher Education, and OIC was correct in assuming that the resolution violated the state's "prudent investment rule." The court found that the students' alleged damage, the commission of a social and moral wrong, was not a legally recognized injury. Therefore, the students lacked standing.

One case challenged the board's authority to use the interest earned on collected fees.[2] The court ruled that interest income can only be used for the sole purpose of the collected fees from which it was derived. Another case challenged a legislative moratorium on the formation of new community colleges within the state.[3] The election held prior to the passage of the moratorium, but not canvassed until after the passage date, came under the provisions of the moratorium because the election was not official until the date of canvassing.

In a controversy over the appointment of trustees, a taxpayer was successful in challenging the procedures on two grounds.[4] First, the board failed to comply with the search committee provisions of the statute and, second, an employee of the college could not participate in the decision because of a conflict of interest.

A Louisiana case challenging the Board of Trustees' authority to change the name of its institution was again before the court.[5] The court, on remand, upheld the lower court ruling that the legislature, not the Board of Trustees, was empowered to change the name of state institutions in Louisiana under the provisions of the state constitution.

State ethics code violations by a member of the Board of Supervisors of an institution was before the court because his company had several contracts with the institution.[6] The court of appeals found that a contract

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1. Associated Students of Univ. of Or. v. Oregon Inv. Council, 728 P.2d 30 (Or. Ct. App. 1986).
2. Queen v. Moore, 340 S.E.2d 838 (W. Va. 1986).
3. Shepherd v. Brumback, 714 P.2d 450 (Ariz. Ct. App. 1985).
4. Taylor v. Salem County Bd., 513 A.2d 365 (N.J. Super. Ct. App. Div. 1986).
5. Board of Regents v. Board of Trustees for State Colleges and Univs., 460 So. 2d 80 (La. Ct. App. 1984)—*see* The Yearbook of School Law 1986 at 228; *transferred* to Supreme Court, 479 So. 2d 931 (La. Ct. App. 1985); *cert. granted and rem'd*, 481 So. 2d 621 (La. 1985); *aff'd*, 491 So. 2d 399 (La. Ct. App. 1986).
6. *In re* Beychok, 484 So. 2d 912 (La. Ct. App. 1986).

with the athletic department to place advertisements on the scoreboards of the stadium violated the code of ethics, statutes forbidding such financial arrangements between board members and the institution. However, a contract awarded to the lowest bidder on the basis of competitive bids, where the supervisor had no input in any part of the bidding process, was an exception to the code and not a conflict of interest. The state supreme court reversed this opinion and found that all of the contracts violated the ethics code and the ethics code did not violate the board members' rights under the equal protection clause.[7]

The authority of the board or state government to set budgets and salaries also was litigated this year. A state court refused to grant jurisdiction in a suit where two-year community college faculty challenged the authority of state university trustees to set salaries.[8] The court ruled that the differentiation of salaries across two- and four-year institutions did not exceed the board's constitutional authority or violate plaintiff's constitutional rights. In another salary dispute, the faculty challenged the authority of the Governor to reduce the budgetary appropriation of an institution by 5% under specific circumstances.[9] The state supreme court upheld a lower court ruling that the Governor was not given veto power by these provisions nor legislative powers in violation of the state constitution by the provisions of the budget-reduction statute.

Sunshine laws, their scope and implementation, were again before the court. A newspaper tried to gain access to a task force on academic achievement.[10] After the drug-related death of one of the school's basketball stars, the Chancellor, in consultation with the Board of Regents, established two task forces to investigate the athletic program at the school. The court ruled that, since the task forces were established by the Chancellor and not by board resolution, they did not come under the requirement of the sunshine laws, allowing them to exclude the press from their deliberations. In a case involving the release of documents under the sunshine laws,[11] the Colorado Supreme Court ruled that certain constitutional rights may have been violated when public safety officers retained the faculty member during an incident at a university office.[12]

Tax exempt status was at issue in a case involving property donated

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7. *In re* Beychok, 495 So. 2d 1278 (La. 1986).
8. Cavaioli v. Board of Trustees, 498 N.Y.S.2d 7 (App. Div. 1986).
9. University of Conn. Chapter of AAUP v. Governor, 512 A.2d 152 (Conn. 1986).
10. A.S. Abell Publishing Co. v. Board of Regents of Univ. of Md., 514 A.2d 25 (Md. Ct. Spec. App. 1986).
11. *See* The Yearbook of School Law 1985 at 303, Uberoi v. University of Colo., 686 P.2d 785 (Colo. 1985).
12. Uberoi v. University of Colo., 713 P.2d 894 (Colo. 1986).

to a college.[13] Property used for educational purposes was tax exempt, while a vacant lot which remained unused was subjected to real estate tax. In another case, college-owned property used for recreational purposes was not tax exempt.[14] The Eleventh Circuit Court found that a commercial property owner was successful in enjoining the institution from closing a public city street without using condemnation proceedings.[15] The owner was able to show that the institution's proposed action would devalue his property.

In a case involving accreditation, a night law school failed in its attempt to win a modification of the rules for admission to the bar.[16] The court refused to bypass the requirement that those admitted to the bar be graduates of an accredited law school. The American Bar Association and the accrediting agency required a law school to have a minimum of six full-time faculty to gain accreditation. The night school had no full-time faculty and, through litigation, was attempting to bypass the requirement.

State statutes on land acquisition were involved when Hastings College of The Law purchased land, a city block, for needed expansion. Under the Relocation Assistance Act,[17] the college was required to pay relocation costs and provide housing for low-income displaced tenants. Hastings had provided housing for those displaced who were in need of housing. Appealing a lower court ruling requiring the school to provide 375 units of comparable housing (which was more than two times the number of units they had condemned), the college challenged the standing of the plaintiffs.[18] The court found that both the named plaintiffs and the organization dedicated to aiding the displaced had standing. However, under the Act the court found that the named plaintiffs had failed to show a current need for housing. Plaintiffs had the burden of demonstrating noncompliance with the Act and failed in that burden, resulting in a reversal of the judgment.

Jurisdiction was at issue where an Illinois court found that a campus police officer had the authority to arrest a drunk driver on a city street adjacent to, but not part of, the campus.[19] In Connecticut, a state court refused to grant jurisdiction in a suit against an out-of-state corporation.[20]

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13. District of Columbia v. Trustees of Amherst College, 515 A.2d 1115 (D.C. 1986).
14. President of Middlebury College v. Town of Hancock, 514 A.2d 1061 (Vt. 1986).
15. Henley v. Herring, 779 F.2d 1553 (11th Cir. 1986).
16. *In re* Laclede School of Law, 700 S.W.2d 81 (Mo. 1985).
17. Cal. Gov't Code § 7264.5 (1969).
18. McKeon v. Hastings College of The Law, 230 Cal. Rptr. 176 (Cal. Ct. App. 1986).
19. People v. Doherty, 487 N.E.2d 1227 (Ill. Ct. App. 1986).
20. Beachboard v. Trustees of Columbia Univ., 502 A.2d 951 (Conn. Ct. App. 1986).

EMPLOYEES

Litigation in this area continued to be heavy. Cases involving discrimination based on race and sex continued to form the bulk of the cases in this section.

Discrimination in Employment

Cases under title VI, title VII, title IX, and age discrimination are reported in this section. The section on discrimination based on disabilities has been moved to chapter one.

Title VI. A group of individuals known as the Knight group filed suit alleging that the state of Alabama continued to foster a dual system of higher education based on race in violation of previous court orders[21] and title VI.[22] In a thorough review of the system of higher education, including enrollment data, the court found that the state continued to maintain a dual system of higher education based on race. The state system was ordered to submit a plan to the court to dismantle this dual system. The Knight group was joined in this action by two predominantly black public state institutions, Alabama A & M and Alabama State University. This action by the two state institutions resulted in a second case.

In this case, the State Board of Education decided not to recertify the teacher education programs at Alabama State University. The Knight group and the institution sued, charging retaliation, and asked for injunctive relief.[23] On appeal, the circuit court found that the public institution lacked standing to sue the state system of higher education. However, the court found the lower court correct in issuing preliminary injunctive relief to the Knight intervenors since they had standing and such relief would prevent irreparable damage from occurring prior to litigation on the merits.

In a similar case in Tennessee, the Sixth Circuit Court affirmed[24] a lower court decision.[25] The court found that the use of "racial quotas" as part of a consent decree[26] did not deprive nonminority applicants of equal

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21. *See* Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1955); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967).

22. *See* The Yearbook of School Law 1986 at 192, United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985).

23. United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986).

24. Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986).

25. Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984).

26. Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

protection.

In a California case, an assistant dean was passed over on four separate occasions for a dean of instruction position within the community college system and alleged discrimination based on race.[27] The circuit court upheld a lower court decision. Using the shifting burden of proof analysis, the circuit court ruled that the institution provided valid business reasons for its decision and the plaintiff was unable to substantive pretext or discriminatory intent under 42 U.S.C. section 1983.

An academically disadvantaged minority student, dismissed from the medical school due to poor academic performance, charged that the school failed to provide adequate remedial programs, a violation of title VI.[28] At trial, the plaintiff based the case on the theory of intentional discrimination, which plaintiff failed to prove, and the plaintiff could not raise a disparate impact theory claim on appeal when it had not been raised at trial.

In another case, a professor sought injunctive relief from an action in state court.[29]The professor alleged that the state suit was brought by the institution in retaliation for his participation in a discrimination suit brought by a graduate student under title VI. The court ruled that federal district courts could not enjoin a state court and relief was denied.

Title VII. This section deals with questions of tolling, disparate impact, disparate treatment, and salary disputes where discrimination is alleged. Questions of discrimination based on religion at a private church-related institution round out the section.

In the lead case, the Supreme Court ruled that Congress did not intend that a state administrative agency review proceeding would have a preclusive effect on a title VII case in federal court.[30] The case involved a black extension agent employed by a Tennessee university who alleged discrimination in the decision to terminate his employment. The circuit court reversed a lower court decision granting summary judgment to the university under the doctrine of res judicata.[31]

Salary disputes under title VII were litigated this year in the Supreme Court. This Supreme Court case involved the elimination of salary disparity between blacks and whites in the North Carolina Exten-

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27. Stones v. Los Angeles Community College Dist., 572 F. Supp. 1072 (C.D. Cal. 1983), *aff'd*, 796 F.2d 270 (9th Cir. 1986).

28. Craft v. Board of Trustees of Univ. of Ill., 793 F.2d 140 (7th Cir. 1986).

29. Paisey v. Vitale, 634 F. Supp. 741 (S.D. Fla. 1986).

30. University of Tenn. v. Elliott, 106 S. Ct. 3220 (1986).

31. Elliott v. University of Tenn., 641 F. Supp. 24 (W.D. Tenn. 1984), *rev'd*, 766 F.2d 982 (6th Cir. 1986).

sion Service.[32] The Court found that the lower court had erred in disregarding plaintiff's multiple regression analysis because it took into account salary disparity existing prior to the passage of title VII.[33] The Court found that the existence of discriminatory disparity in salaries prior to the passage of title VII does not remove an obligation to eliminate the disparity after passage of the legislation. The Court remanded the case to the federal circuit court for a new determination based on the inclusion of plaintiff's multiple regression analysis along with other evidence previously considered.

In a case involving the award of damages where discrimination was found, the court ruled that the amount of the award hinged on whether the plaintiff was bringing suit based on the equal pay theory[34] or the *Gunther* theory.[35] Under the *Gunther* theory, the plaintiff can claim intentional wage discrimination based on sex without proving that she was paid less than a comparable male employee. Under this theory, damage may have commenced at the time of hiring. Under equal pay theory, she must show that there was disparity between her salary and that of a male doing the same work. In that case, the damages would be determined by the difference between the two salaries. The court vacated and remanded the decision for appropriate determination of damages.

Questions of tolling were again before the court. In one tolling case, a black custodial worker with an outstanding work record while a custodian charged discrimination in the decision to terminate his employment.[36] The plaintiff had been allowed to move to the landscape department where he garnered poor job performance evaluations which continued even after he was moved back to the custodial department. The court awarded a summary judgment in favor of the defendants since the plaintiff failed to file charges within the 180-day filing period. The start of the 180-day period was determined by the date of the alleged discrimination and plaintiff's awareness of its existence. The plaintiff also failed to produce any evidence that termination resulted because of his race.

Another tolling case involved the concept of the existence of a continuing violation which would allow filing even when 180 days had elapsed since the date the discrimination commenced.[37] The court,

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32. Bazemore v. Friday, 106 S. Ct. 3000 (1986).
33. Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984).
34. Sellers v. Delgado College, 781 F.2d 503 (5th Cir. 1986).
35. *Citing* County of Washington v. Gunther, 452 U.S. 161 (1981).
36. Arna v. Northwestern Univ., 640 F. Supp. 923 (N.D. Ill. 1986).
37. Berry v. Board of Supervisors of La. State Univ., 783 F.2d 1270 (5th Cir. 1986).

rejecting plaintiff's appeal from a remanded decision,[38] found that three factors must be present in continuation theory. First, the separate instances of discrimination must be of the same type; second, the alleged acts must recur; and, third, the acts must not have the degree of permanence which should trigger the plaintiff to assert his rights. The court found that the assignment of a teaching load was a one-time act of significant permanence requiring the immediate filing of a complaint, even though the consequences of the action continued through the semester in question. In a Vermont case, the court found that the notice of nonrenewal of a contract was not contaminated by any ambiguity in the institution's intentions, implicating continuation theory.[39]

In a Delaware case, the court found that the filing time should begin tolling at the time the plaintiff became aware of the discrimination.[40] Plaintiff had no reason to doubt the validity of the institution's reason for not renewing his contract (i.e., to acquire someone with a doctorate until an advertisement in *The Chronicle of Higher Education* listed the job with the same degree requirements the plaintiff had). The institution's request for a summary judgment was denied. However, a charge of discrimination in the award of salaries was time barred.[41] The court also found that the spouse of the plaintiff lacked standing in the case.

Disparate treatment cases involve charges that the defendant has discriminated against the plaintiff because of her sex and that this is part of a pattern or practice against a protected class. In an Illinois case, a female temporary faculty member charged that the system of classifying faculty into two categories, temporary or regular faculty, was discriminatory.[42] The court found that the mere existence of a dual classification scheme would not constitute sex discrimination as long as similarly situated men and women were not treated differently. Furthermore, the court found a lack of individual cases of discrimination within the institution to support the class claim of disparate treatment. In Iowa, the Eighth Circuit Court of Appeals affirmed a lower court decision that the plaintiff was not promoted due to a lack of scholarly productivity, not because of his race.[43]

In a disparate impact case, a temporary white employee filed a discriminatory charge when the president of a black institution appointed a black female returning from a leave to the permanent full-time position for which plaintiff was an applicant.[44] This institution was

38. Berry v. Board of Supervisors of La. State Univ., 715 F.2d 971 (5th Cir. 1983).
39. Shockley v. Vermont State Colleges, 793 F.2d 478 (2d Cir. 1986).
40. Ohemeng v. Delaware State College, 643 F. Supp. 1575 (D. Del. 1986).
41. Feng v. Sandrik, 636 F. Supp. 77 (N.D. Ill. 1986).
42. Griffin v. Board of Regents of Regency Univ., 795 F.2d 1281 (7th Cir. 1986).
43. Anderson v. University of N. Iowa, 779 F.2d 441 (8th Cir. 1985).
44. Craig v. Alabama State Univ., 804 F.2d 682 (11th Cir. 1986).

under a 1978 court order to eliminate discriminatory hiring practices against whites.[45] The court found that, while the award of positions to employees returning from study leave was facially neutral, it served to perpetuate discriminatory employment practices having a disparate impact on white applicants. The numbers involved in study leaves in this case served to perpetuate the status quo of a racially lopsided work force. The plaintiff has shown that the reasons offered by the university were pretextual. The case was remanded to determine proper relief.

In a unique case involving an institution operating under a consent decree,[46] the plaintiff alleged sex discrimination in the decision not to hire her.[47] In regard to a faculty position requiring approval of both the sociology and economics departments, the plaintiff was the third of three candidates recommended for the position. The first and second choices refused the position. At that point, the job description changed from a nontenured joint appointment to one that could be in one of the two departments and could be a tenure-track position. The court found this change to be within the requirements of the consent decree and advantageous to the plaintiff's candidacy, since the economics department had viewed her as an unqualified candidate. The committee had recommended the plaintiff only for a nontenured position and decided to reopen the search. The court noted that the consent decree under which Brown University was operating changed the way the shifting burden of proof was applied in this disparate impact case. The plaintiff satisfied the prima facie requirements, while the institution established valid employment reasons for its decision. The burden of proof strategies under the consent decree depart from the standard requirement at this point. In determining whether the reasons are pretextual, the burden of proof falls, because of the consent decree, on the institution. The institution must provide "clear and convincing evidence"[48] to show that the reasons are free of discriminatory pretext. The case was remanded for this determination.

Several other disparate impact cases turned on plaintiff's inability to prove sex discrimination as the reason for the institution's employment decision.[49]

Retaliation for a complaint alleging discrimination constituted another group of cases under title VII. In a discrimination case which has

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45. Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978).

46. *See* The Yearbook of School Law 1983 at 296. Lamphere v. Brown Univ., 491 F. Supp. 232 (D.R.I. 1980), *aff'd*, 685 F.2d 743 (1st Cir. 1982).

47. Lamphere v. Brown Univ., 798 F.2d 532 (1st Cir. 1986).

48. *Id.* at 536.

49. Wallace v. University of Mo., St. Louis, 624 F. Supp. 560 (E.D. Mo. 1986); Williams v. State Univ. of N.Y., 635 F. Supp. 1243 (E.D.N.Y. 1986).

many elements of a retaliation case, in that the plaintiff was an employee of the institution, the court used the burden of proof standards used in retaliation cases.[50] The plaintiff alleged that the act of eliminating a tenure-track teaching position for which she had applied was retaliation. In establishing a prima facie case, plaintiff must show that she participated in protected activity, suffered an adverse employment decision, and demonstrated a causal relationship between the protected activity and the adverse employment decision.[51] Plaintiff met these three requirements and the burden then sifted to the institution to show nondiscriminatory reasons for the employment decision. The plaintiff then had to show that those reasons were pretextual. The court found that the plaintiff adequately substantiated the pretextual nature of the reasons. The final step in retaliation is that the institution has the burden of showing that the plaintiff would not have been hired regardless of the retaliatory intent of the employer. The case was remanded because the lower court erred in placing this burden on the plaintiff.

A North Carolina case involved both a charge of discrimination in the award of a promotion to full professor and retaliation because she filed sex discrimination charges with the Chancellor.[52] The court found that the institution's reason, inadequate publications, was both valid and nonpretextual. Plaintiff could not hold failure to achieve promotion the second year as retaliation when her publication record remained unchanged.

A private liberal arts college was charged with hiring discrimination and retaliation against the plaintiff, a female employee.[53] Defendants, under a disparate treatment analysis, were able to show that the plaintiff was passed over for promotion because she lacked adequate supervisory skills—a legitimate, nondiscriminatory, nonpretextual, business reason. Furthermore, the court found that plaintiff's retaliation charges, the movement of her office, and reassignments to various divisions, were based on organizational and space concerns and were free of retaliatory motives. Defendants produced evidence that plaintiff's supervisors made an extra effort to accommodate plaintiff's complaints about location and space.

A night-time and weekend manager, who possessed a documented record of inadequate job performance, was unable to substantiate in court a holding of sex discrimination or retaliation in his employment termination.[54]

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50. Ruggles v. California Polytechnic State Univ., 797 F.2d 782 (9th Cir. 1986).
51. *Id.* at 785.
52. Farlow v. University of N.C., 624 F. Supp. 434 (M.D.N.C. 1985).
53. Gold v. Gallaudet College, 630 F. Supp. 1176 (D.D.C. 1986).
54. Johnson v. Howard Univ., 641 F. Supp. 219 (D.D.C. 1986).

Several cases involved charges of religious discrimination at private church-affiliated institutions. In one case, the circuit court affirmed a lower court ruling.[55] The district court was correct in finding that the philosophy department's requirement that a faculty position be filled by a Jesuit priest was a "bona fide occupational qualification," given the nature of the institution and the department.[56]

A similar case involved an unsuccessful female applicant for a theology position at a Catholic university.[57] The woman charged discrimination in hiring based on sex and a violation of her first amendment rights resulting from her position on abortion. The first amendment claim failed because that same amendment prohibited the court from looking at hiring decisions in the theology department, which is so closely tied to the religious affiliation of the institution. Additionally, the concept of academic freedom, which is not a first amendment right, was not tied to hiring decisions. The title VII claim failed because the statute clearly exempts religious organizations from the requirements of the law. Involvement in the hiring decisions of the theology department would entangle the court in church doctrine, and therefore was prohibited by the Constitution.

In another religious discrimination case, the court found that the case was not ripe since E.E.O.C. had not taken a position on the discrimination charge, even though the state agency had found reasonable cause to believe discrimination may have occurred.[58]

The final case under title VII involved questions of who can be named in a suit under the statute. In a Kansas case, the court ruled that individual officers, along with the institution, are employers within the meaning of title VII and can be held liable in their official capacity, but cannot be personally liable.[59]

Equal Pay Act. Changes in technology necessitated changes in the employee categories of a union print shop at a university. In an attempt to keep costs competitive with nonunion shops, new collective bargaining agreements were negotiated with two job categories. These job categories, journeyperson printer and computer typist/paste makeup assistant, were paid at differential rates, even though similar tasks were performed by these two groups. Paste makeup assistants, as a class, brought this action alleging discrimination in pay in violation of Washing-

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55. *See* The Yearbook of School Law 1985 at 310; Prima (sic) v. Loyola Univ., 585 F. Supp. 435 (N.D. Ill. 1984).
56. Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 354 (7th Cir. 1986).
57. Maguire v. Marquette Univ., 627 F. Supp. 1499 (E.D. Wis. 1986).
58. Seattle Pacific Univ. v. Haas, 626 F. Supp. 539 (W.D. Wash. 1985).
59. Barger v. Kansas, 630 F. Supp. 88 (D. Kan. 1985).

ton's Equal Pay Act which parallels the federal act.[60] The court noted that both the federal statute and the state law permitted differential pay on valid factors other than sex. In this case, the court found that job distinctions were necessary to phase out an outmoded job classification scheme while allowing the print shop to remain competitive. The job classifications had not been awarded based on sex and fit the exceptions to the law, a legitimate business reason. The court further noted that the salary to the journeyperson printers was not a gift of state money in violation of the state constitution.

Title IX. Residuals from the *Cannon Case*[61] were in the court again. The circuit court, because of previous rulings,[62] upheld the district court's res judicata ruling in this case.[63] Previous court rulings on the matter of the denial of plaintiff's application for admission to medical school had already been litigated, fulfilling the requirements of the principal of res judicata. The court found plaintiff's filing of this complaint to be an "egregious and blatant violation" of Federal Rules of Civil Procedure and upheld the district court's ruling that defendant's attorneys' fees and costs be borne by the plaintiff. The court stated: "Mrs. Cannon's ten-year history of litigation demonstrates her penchant for harassing the defendants."[64]

A case on appeal from the district court[65] dealt with both title VII and title IX employment claims.[66] The plaintiff, the former women's basketball coach, failed to show that she was discriminated against in the assignment of tasks under title VII. She also failed to demonstrate that the athletic program was a program receiving federal funds under title IX. Citing *Grove City College*,[67] the court affirmed the district court's finding that the financial aid office, while having some record-keeping responsibilities, was not the primary administrator of athletic scholar-

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60. Adams v. University of Wash., 722 P.2d 74 (Wash. 1986).

61. See The Yearbook of School Law 1980 at 119, 200, Cannon v. University of Chicago, 441 U.S. 677 (1979).

62. See The Yearbook of School Law 1982 at 238, Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981); The Yearbook of School Law 1984 at 304, Cannon v. University Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983); The Yearbook of School Law 1986 at 262, Cannon v. Loyola Univ. of Chicago, 609 F. Supp. 1010 (N.D. Ill. 1985).

63. Cannon v. Loyola Univ. of Chicago, 784 F.2d 777 (7th Cir. 1986).

64. *Id.* at 782.

65. See The Yearbook of School Law 1986 at 247, O'Connor v. Peru State College, 605 F. Supp. 753 (D. Neb. 1985).

66. O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986).

67. See The Yearbook of School Law 1985 at 312, Grove City College v. Bell, 104 S. Ct. 1211 (1984).

ships nor could infection theory justify compelling the athletic department's enforcement of title IX. A Texas case involving a student athlete reached a similar ruling.[68] A decision in this case had been put off earlier, pending the outcome of the *Grove City College* case.

Age Discrimination. A former dean, whose position was eliminated but who was retained as an instructor, sued alleging age discrimination in the filling of another administrative position.[69] The court noted that the mere hiring of a younger person does not yield a discriminatory finding. Furthermore, plaintiff could not establish a prima facie case where he failed to apply for the position.

In another case involving the age of the person hired, plaintiff was unable to show that the Ohio Civil Rights Commission decision emanating from his age discrimination claim was arbitrary and capricious.[70] The Commission ruled that the fact that a younger person was hired to fill the associate professor's position was not enough, standing alone, to reach a finding of age discrimination.

A Wisconsin case involved a claim of age discrimination and retaliation in the termination of an employee.[71] An arbitrator's determination, pursuant to the collective bargaining agreement, of lack of just cause for termination did not have a preclusive effect. The findings of an unemployment compensation hearing also were not preclusive. The plaintiff failed to show that the institution's decision was retaliation for a suit filed by her son. In Kentucky, a court ruled that a plaintiff was entitled to an evidentiary hearing on her dismissal as a registrar.[72]

Nontenured Faculty

Nontenured faculty continue to bring claims for alleged violations of first amendment rights, due process, and equal protection claims in an institution's failure to renew contracts or to grant tenure. Part-time faculty issues also are reviewed.

First Amendment Freedom of Speech. A faculty member, who used profanities during his lectures and was warned and subsequently dismissed after the completion of prescribed administrative procedures, brought a suit alleging violation of his first amendment

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68. Bennett V. West Tex. State Univ., 799 F.2d 155 (5th Cir. 1986); *see* Bennett v. West Tex. State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (5th Cir. 1983), *cert. denied*, 466 U.S. 903 (1984).

69. Greaves v. Jefferson State Junior College, 494 So. 2d 409 (Ala. 1986).

70. McCreary v. Ohio Civil Rights Comm'n, 486 N.E.2d 143 (Ohio Ct. App. 1984).

71. Johnson v. University of Wis.-Milwaukee, 783 F.2d 59 (7th Cir. 1986).

72. Clifton v. Midway College, 702 S.W.2d 845 (Ky. 1986).

rights, among others.[73] At trial, the jury found for the plaintiff on his first amendment speech and equal protection claims. The district court granted judgment n.o.v. for the defendant institution because of a lack of evidence to support the jury's conclusions. On appeal, the Fifth Circuit Court found that the first amendment does not protect profanity. The court noted that free speech rights must be balanced against those of the audience. Also, the district court dismissed the equal protection claim since there was no evidence of differential treatment from similarly situated individuals.

In another first amendment case, a staff member may have been dismissed for "whistleblowing."[74] After several years of outstanding job performance evaluations, relationships began to deteriorate after plaintiff called to the attention of his superiors a faculty member's inappropriate financial dealings with institutional money. While a procedural due process claim was not substantiated by the plaintiff, the substantive due process claim of a violation of first amendment rights was remanded for further determination. A public employee's disclosures of financial improprieties to his supervisor has long been recognized as protected speech. The fact that he expressed those views privately did not diminish his first amendment rights.

Nonrenewal Procedures. This section contains controversies alleging discrimination, the existence of property rights, and breach of contract when institutions failed to renew contracts or acted to deny tenure to faculty.

In Pennsylvania, an Arab-American associate professor was denied tenure and filed title VII and 42 U.S.C. sections 1981 and 1983 claims and other state claims for discrimination based on race.[75] The district court, on a motion for summary judgment, ruled that the title VII claim was time barred while the section 1981 and section 1983 claims should be adjudicated. The federal circuit court affirmed the lower court decision. Specifically, they found that the term "race," under the law, is loosely defined by Congress to mean Arab or any other group which is ethnically or physiologically distinct. Furthermore, the court noted that the change in the statute of limitations should not be applied retroactively in this case; therefore, the section 1981 claim was not time barred.

In another case, a faculty member whose two-year contract was not renewed after several negative teaching evaluations sued for breach of

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73. Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

74. Brown v. Texas A & M Univ., 804 F.2d 327 (5th Cir. 1986).

75. Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), *cert. granted in part*, 107 S. Ct. 62 (1986).

contract and defamation.[76] The court found that no obligation was owed to the plaintiff beyond the contract period. The defamation claim was dismissed because he had agreed to the evaluations as part of the employment contract and could not now allege defamation because the evaluations were negative. The court found the consent privilege to be an absolute bar to the plaintiff's claims and the comments in the evaluations not to be defamatory. In a similar case, a liberty interest was not implicated when reasons were provided, as per the contract, for nonrenewal.[77] In a Utah case, a faculty member was unsuccessful in the retroactive application of a statute which required a hearing for a nonrenewal decision.[78]

In Ohio, the court found that the institution had met its burden of providing a nondiscriminatory reason, poor scholarship, for not awarding tenure while plaintiff failed in her burden of showing "appropriate scholarship."[79] A number of cases had similar results where the plaintiff failed to show that the institution's action violated protected rights.[80]

A faculty member alleging sex discrimination requested discovery of the contents of outside reviewers' letters of recommendation, the institutions record of discrimination in other areas such as its relationship with students, the records of schools which have associations with the defendant institution, and the records for all faculty members who have received tenure at the institution.[81] In a federal rules decision, the district court affirmed the magistrate's denial of discovery on all requests except the final one. The court granted the plaintiff's discovery request on all faculty members granted tenure from the period 1974 to 1984 instead of the three-year period granted by the magistrate.

In another discovery case, the court reviewed the issue of academic freedom of tenure review committees and the plaintiff's need to review critical records in an attempt to build a case for discrimination.[82] The court noted the discrepancy within the circuit courts on this matter. They reviewed the Seventh[83] and the Second[84] Circuit Courts' decisions,

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76. Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. Ct. 1986).

77. Lovelace v. Southeastern Mass. Univ., 793 F.2d 419 (1st Cir. 1986).

78. Moore v. Utah Technical College, 727 P.2d 634 (Utah 1986).

79. Gutzwiller v. Fenik, 645 F. Supp. 363 (S.D. Ohio 1986).

80. Singh v. Lamar Univ., 635 F. Supp. 737 (E.D. Tex. 1986); Smith v. State, 389 N.W.2d 808 (N.D. 1986); Storrer v. University of S.C., 343 S.E.2d 664 (S.C. Ct. App. 1986); Thornquest v. King, 626 F. Supp. 486 (M.D. Fla. 1985); Waring v. Fordham Univ., 640 F. Supp. 42 (S.D.N.Y. 1986); Weinstein v. University of Ill., 628 F. Supp. 862 (N.D. Ill. 1986); Williams v. Weaver, 495 N.E.2d 1147 (Ill. Ct. App. 1986).

81. Jackson v. Harvard Univ., 111 F.R.D. 472 (D. Mass. 1986).

82. Rollins v. Farris, 108 F.R.D. 714 (E.D. Ark. 1985).

83. *See* The Yearbook of School Law 1984 at 282, E.E.O.C. v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983).

84. *See* The Yearbook of School Law 1983 at 305, Gray v. Board of Higher Educ., 692

which attach restrictions to plaintiff's access to information on the tenure decision and balance the rights of confidentiality of the institution's deliberations against the rights of the plaintiff to mount a case. However, the court agreed with the Fifth[85] and the Third[86] Circuit Courts, which held that plaintiff only must show relevance as described in the discovery rule in order to get access to committee votes and deliberations in committee promotion and tenure decisions.

A district court case, on remand, involved a determination of whether a property right existed based on a state contract. The court determined that Rutgers University, because of its extensive private funding sources, lacked sovereign immunity under the eleventh amendment.[87]

In Illinois, a professor had signed a contract which promised to recommend tenure the next fall. The dean failed to submit the tenure request in a timely manner and a new dean sent the plaintiff a letter of nonrenewal.[88] The court found that the trial court evidence supported a finding that the plaintiff would have received tenure but for the error of the dean. However, the trial court erred in awarding damages beyond the date of trial. In another contract case, the court ruled that the lower court erred in finding that the school owed the faculty member a tenured appointment.[89] Regardless of the definition of a visiting professor in the faculty handbook, the school could enter into a contract agreement to hire the plaintiff as a visiting professor under different conditions as long as that was clearly stated in the terms of the contract. Therefore, plaintiff was not in a full-time tenure track position long enough to qualify for automatic tenure. A Pennsylvania breach of contract case was remanded for a consideration of whether affirmative action statements in the faculty handbook required that gender be a positive factor in promotion and tenure considerations under the employment contract.[90]

In a denial of tenure case, a plaintiff was able to substantiate bias based on sex at a grievance before an institutional committee. The plaintiff was guaranteed that, in a second tenure review, those with bias would be removed from the review process. However, at the depart-

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F.2d 901 (2d Cir. 1982).

85. *See* The Yearbook of School Law 1982 at 264, *In re* Duman, 661 F.2d 426 (5th Cir. 1981).

86. *See* The Yearbook of School Law 1986 at 245, E.E.O.C. v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985).

87. Kovats v. Rutgers, 633 F. Supp. 1469 (D.N.J. 1986); *see* The Yearbook of School Law at 246, Kovats v. Rutgers, 749 F.2d 1041 (3d Cir. 1984).

88. Lewis v. Loyola Univ. of Chicago, 500 N.E.2d 47 (Ill. Ct. App. 1986).

89. Tetlow v. Loyola Univ. of New Orleans, 483 So. 2d 1242 (La. Ct. App. 1986).

90. Sola v. Lafayette College, 804 F.2d 40 (3d Cir. 1986).

mental level, those with bias, having participated in the previous decision, voted to deny tenure. The plaintiff immediately filed this action. The court ruled that the full tenure review process should be completed prior to judicial intervention.[91] In the final case of this section, in the courts since 1972,[92] the plaintiff may have exhausted the last avenue of litigation. The state court ruled that the plaintiff's state claims were time barred.[93]

Tenured Faculty

A number of cases in this section involved the termination of tenured faculty for cause. First amendment claims and denial of employee privileges also are reviewed.

Termination for Cause. The reasons for termination in the cases reviewed included charges of plagiarism and failure to perform assigned duties. Several cases also alleged defamation claims resulting from the termination letter. In a Minnesota case,[94] a tenured faculty member at a public institution was charged with plagiarism on a laboratory manual he had written for his class. He was disciplined but not dismissed for that offense. Later, a group of students filed a grievance against him, charging a lack of moral integrity in the plagiarism incident, incompetence as a teacher, harassment of students, and unprofessional conduct. Following the procedures outlined in institutional documents, a hearing and appeals procedure eventually resulted in termination of the plaintiff's employment. The Eighth Circuit Court found that res judicata would not apply to this case, based on previous disciplinary action for the plagiarism charge. Plaintiff failed to show a prima facie case of discrimination based on race, that he was treated any differently than a similarly situated faculty member under the equal protection provisions, or that due process requirements had not been met.

In a Tennessee case,[95] a faculty member who failed to perform assigned tasks was absent from the institution without a doctor's excuse and was eventually terminated. Following the institutional procedures in dismissal, the court found that the institution's decision to terminate was based on evidence and was not arbitrary and capricious.

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91. Smitow v. Rutgers Univ., 510 A.2d 1118 (N.J. 1986).

92. *See* The Yearbook of School Law 1983 at 304, Skehan v. Board of Trustees of Bloomsburg State College, 669 F.2d 142 (3d Cir. 1982), *rehr'g denied*, 675 F.2d 72 (3d Cir. 1982), *cert. denied*, 459 U.S. 1048 (1982).

93. Skehan v. Bloomsburg State College, 503 A.2d 1000 (Pa. Commw. Ct. 1986).

94. Agarwal v. Regents of Univ. of Minn., 788 F.2d 504 (8th Cir. 1986).

95. Josberger v. University of Tenn., 706 S.W.2d 300 (Tenn. Ct. App. 1985).

In an Alabama case,[96] a faculty hearing committee found the plaintiff guilty as charged, but recommended probation. In dicta, the state supreme court indicated that, while the plaintiff's right to have an attorney present for the hearing was not before the court, it probably was not a requirement in due process. Furthermore, the court found it appropriate for the President to consult the plaintiff's employment file in arriving at the decision to terminate employment.

In a Wisconsin case,[97] the state supreme court reversed a lower court ruling[98] which required a name-clearing hearing. The basis for the reversal was that the plaintiff had failed to complete the institution's appeals process, exhausting the administrative remedies, before filing the claim. In an Indiana case,[99] the court found no error in the institution's dismissal procedures and decision to terminate a tenured faculty member. The institution complied with the state open-door law during the conduct of the hearing. The evidence clearly indicated the professor's failure to fulfill his teaching responsibilities in both practice and content of the courses taught. The first amendment and tort claims were not substantiated.

In a Pennsylvania case,[100] the court found that the eleventh amendment immunity provisions applied to a public college. The court noted that the remedy sought for termination could be provided by an arbitrator, as defined in the collective bargaining agreement, and that plaintiff should have exhausted administrative remedies prior to pursuing litigation.

Defamation charges emanated from a letter notifying the plaintiff that the result of a hearing was termination.[101] The court found that a letter of termination which communicated the results of a quasi-judicial hearing was privileged communication not subject to a charge of defamation.

Denial of Employee Privileges. Several cases involved physicians who engaged in private practice while serving as faculty of a teaching hospital. An Illinois case involved plaintiff's claim that the institution was forcing him out of his tenured position by denying him certain privileges.[102] The plaintiff alleged that the institution failed to

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96. Johnson v. Alabama Agricultural & Mechanical Univ., 481 So. 2d 336 (Ala. 1985).
97. Kramer v. Horton, 383 N.W.2d 54 (Wis. 1986).
98. *See* The Yearbook of School Law 1986 at 252, Kramer v. Horton, 371 N.W.2d 801 (Wis. Ct. App. 1985).
99. Riggin v. Board of Trustees of Ball State Univ., 489 N.E.2d 616 (Ind. Ct. App. 1986).
100. Wynne v. Shippensburg Univ., 639 F. Supp. 76 (M.D. Pa. 1985).
101. Webster v. Byrd, 494 So. 2d 31 (Ala. 1986).
102. Williams v. Northwestern Univ., 497 N.E.2d 1226 (Ill. Ct. App. 1986).

assign him patients and research assistants, made his salary dependent on patient-generated income, removed his name from publications, and moved him out of his laboratory. The court held that this case hinged on the conditions of the tenure contract. On remand, plaintiff would be allowed to amend his claim to include the appropriate contract information.

A faculty member was charged with sexual harassment and discrimination of female students. These charges were placed in the faculty member's folder and he was reassigned to teach another class. The state court issued a writ of mandamus and the information was removed from plaintiff's personnel record. The Ninth Circuit Court found that the doctrine of res judicata applied to any claims previously litigated in state court and remanded the case for a determination of other claims outside the adjudicated state claims.[103]

In an Arizona case, a faculty member filed a claim when his salary was reduced after he stepped down from an administrative position.[104] The court found that the plaintiff's claim failed in light of university policy.

In Pennsylvania, a faculty member sued when an employment conflict arose over commitments he had made outside the institution after he had applied for early retirement but before the institution acted on the application.[105] University rejection of his application, as allowed by the retirement policy, where the applicant inappropriately relied on approval could not result in institutional liability.

A law professor represented a group in a suit against the city resulting in a resolution at city council alleging that he had improperly used state funds. The law professor sued and the court found that the city council resolution was not a bill of attainder nor had it harmed the relationship between the professor and his employer.[106] Plaintiff failed to show constitutional violations, and the district court dismissed the case. The Eleventh Circuit Court found that the plaintiff had valid first amendment and due process claims which could be litigated under 42 U.S.C. section 1983.[107]

Several cases involved defamation claims resulting from denial of privileges. A faculty member who was denied promotion charged his department chair with libel and slander for an adverse memo to the promotion committee which called attention to the inadequate publica-

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103. Clark v. Yosemite Community College Dist., 785 F.2d 781 (9th Cir. 1986).
104. Franken v. Arizona Bd. of Regents, 714 P.2d 1308 (Ariz. Ct. App. 1986).
105. Havas v. Temple Univ., 516 A.2d 17 (Pa. Super. Ct. 1986).
106. Little v. City of N. Miami, 624 F. Supp. 768 (S.D. Fla. 1985).
107. Little v. City of N. Miami, 805 F.2d 962 (11th Cir. 1986).

tion record of the plaintiff.[108] Defendant's department chair's statements were based on fact and amounted to the expression of opinion covered by constitutional privilege. In a Washington case, a faculty member charged defamation, violation of free speech, and actions that had a chilling effect on future speech as a result of action by his department.[109] The plaintiff's department had voted to reprimand him for inappropriate response to interdepartmental activities. Unrelated to this action was plaintiff's grievance over space and pay. The state supreme court affirmed the lower court judgment against the plaintiff, required him to bear costs, and stated:

> The issues in this case have been going on longer than this specific action. The lengthy record sets out a picture of bickering adults. The courts are an inappropriate forum in which to settle a personal squabble among professional colleagues; the plaintiff's case has no merit. The award of attorney fees is affirmed.[110]

Termination Due to Financial Exigency or Program Elimination. In a Kansas case, the plaintiff was able to show that her contract was breached, and the case was remanded for a new trial.[111] The plaintiff was dismissed because of a financial exigency and the institution, within the two-year time period after that action, filled a position in the plaintiff's area. In a California layoff case,[112] the court found that another faculty member with a split appointment had seniority over the plaintiff. The court noted that, by definition within the contract, seniority goes to the individual and would not be split between the various appointments held by the individual. Additionally, plaintiff's application for credentials to teach math with the resulting layoff of math teachers was not timely since it was made after the date layoff notices must be forwarded to affected faculty.

In a dismissal resulting from declining enrollment, the plaintiff was unable to support a claim that dismissal was due to protected speech.[113] In another financial exigency case, the court refused to issue a summary judgment.[114] The court found sufficient facts to warrant the determination at trial of whether a financial exigency was the factor in the dismissal of a sixty-two year old professor. In Idaho, the state had adequately established a financial exigency to warrant the layoff of the plaintiff.[115]

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108. Bellivean v. Rerick, 504 A.2d 1360 (R.I. 1986).
109. Meyer v. University of Wash., 719 P.2d 98 (Wash. 1986).
110. *Id.* 104.
111. Vandever v. Junior College Dist., 708 S.W.2d 711 (Mo. Ct. App. 1986).
112. Vassallo v. Lowrey, 224 Cal. Rptr. 357 (Cal. Ct. App. 1986).
113. Hamer v. Brown, 641 F. Supp. 662 (W.D. Ark. 1986).
114. Linn v. Andover Newton Theological School, 642 F. Supp. 11 (D. Mass. 1985).
115. Milhomer v. Keppler, 644 F. Supp. 201 (D. Idaho 1986).

In a case on remand,[116] the federal district court found that due process had been guaranteed to a plaintiff removed in the middle of a one-year contract.[117]

The agricultural extension office at a state institution declared a financial exigency, dismissing the plaintiff a year before she was eligible for voluntary retirement. The extension office later in the year came up with a surplus in its budget. The lower court found that the defendant institution had failed to prove the existence of a financial exigency. On appeal, the Idaho Supreme Court held that the burden of proving the existence of a financial exigency rests with the institution and that substantial evidence existed to show that the institution failed in its burden of proof.[118]

Denial of Employee Benefits. Several cases in this section deal with whether certain employee benefits are subject to either federal withholding or social security tax. A private college challenged the federal government's right to retroactively assess FICA deductions against money put into an employee's retirement annuity contract. The 1984 Deficit Reduction Act applied retroactively to FICA taxes paid. Legislation in 1983 "decoupled" FICA and income tax and required the payment of FICA tax on retirement annuity contributions in conflict with 1964 revenue regulations. This conflict, adjudicated in previous litigation,[119] raised the potential for this refund challenge. The congress, through 1984 legislation, attempted to close the refund option by retroactive application of the provisions. This decision upheld the retroactive provisions as constitutional.[120] The retroactive enforcement of an already collected tax was not a harsh and oppressive action when measured against a public benefit. In an Ohio case involving a private university, the employee retirement annuity contribution by a tax-exempt employer was subject to FICA tax.[121] Another case involved fringe benefits as taxable income requiring withholding.[122] The court found that fringe benefits such as parking space, recreation center membership, and tuition payments of an employee's children's high school tuition costs were deducted from annual wages, making them part of gross wages for income withholding purposes. The court also

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116. See The Yearbook of School Law 1985 at 325, Russell v. Harrison, 736 F.2d 283 (5th Cir. 1984).
117. Russell v. Harrison, 632 F. Supp. 1436 (N.D. Miss. 1986).
118. Pace v. Hymas, 726 P.2d 693 (Idaho 1986).
119. Rowan Companies Inc. v. United States, 452 U.S. 247 (1981).
120. Canisius College v. United States, 799 F.2d 18 (2d Cir. 1986).
121. Xavier Univ. v. United States, 633 F. Supp. 15 (S.D. Ohio 1986).
122. Marquette Univ. v. United States, 645 F. Supp. 1007 (E.D. Wis. 1985).

found that fellowship awards to faculty for summer research projects were also wages requiring withholding. Two other cases had the same result for an annuity contract[123] and funds to defray tuition expenses of an employee's children.[124]

A challenge to a widow's payment of federal tax on money received from retirement plan life insurance was litigated. The Seventh Circuit Court ruled that retirement system survivor's insurance was not a "life insurance contract" equaling an exemption from gross income for tax purposes.[125]

In a Virginia case, the federal circuit court refused to grant a tax exemption for a priest's income from a secular university.[126] The court rejected the priest's claim that he was an agent of a tax exempt religious order.

In another case, the court upheld the demotion of a civil service employee.[127] The court found the evidence of extensive illness resulting in insufficient delivery of service to be substantiated and the hearing procedures to be fair. An Arizona court found that the plaintiff, a classified staff employee, had no contractual right to reclassification.[128] In a New Hampshire case, the court found a food service employee was eligible for unemployment compensation when she was laid off during the summer months but told she must be on call in order to keep her job.[129] In Montana, a university employee was a farm worker exempt from the overtime provisions of the Minimum Wage and Overtime Act.[130]

Administrators and Staff

Cases involving termination, breach of contract, first amendment rights, and defamation were litigated during the last year. In Colorado, a department head was unable to support a defamation claim against faculty who published a memorandum outlining reasons for his requested removal.[131] However, a slander suit against an individual who held an administrative position at a private college was successful.[132] At a dinner meeting on institutional business, the officer erroneously reported to

123. Western Reserve Academy v. United States, 801 F.2d 250 (1986).
124. John Carroll Univ. v. United States, 643 F. Supp. 675 (N.D. Ohio 1986).
125. Barnes v. United States, 801 F.2d 984 (7th Cir. 1986).
126. Fogarty v. United States, 780 F.2d 1005 (Fed. Cir. 1986).
127. Hahn v. University of Cincinnati, 489 N.E.2d 1081 (Ohio C.P. 1985).
128. Duke v. Arizona Bd. of Regents, 721 P.2d 1159 (Ariz. Ct. App. 1986).
129. *In re* Locke, 503 A.2d 754 (N.H. 1985).
130. Terry v. Board of Regents of Higher Educ., 714 P.2d 151 (Mont. 1986).
131. Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986).
132. Joseph v. Elam, 709 S.W.2d 517 (Mo. Ct. App. 1986).

others that the dean of students was an ex-convict. The dean of students was able to substantiate that this rumor eventually resulted in the loss of his position. In a Texas case, the pronouncements about a supervisor written in a "secret diary" which fell into the hands of the supervisor were not protected speech under the first amendment.[133] Communications on matters involving a personal employee dispute which are not matters of "public concern" are not constitutionally protected speech barring plaintiff's termination.

A former associate dean and department head alleged that harassment resulting in his constructive discharge was a violation of his first amendment rights.[134] The plaintiff alleged that officials failed to deal with the harassment of another faculty member in the plaintiff's department. The court found the discharge claim on the associate dean's position to be time barred, and that the supervisors were not negligent in their responsibility to supervise the plaintiff.

In a North Carolina case,[135] the court found adequate reasons and due process in the removal of the director of student activities. The director was accused of personal misconduct when he called a meeting of all directors to discuss the dean of student's managerial skills while the dean was out of town. The court found no procedural error in the dean's discussion of the matter, prior to his dismissal decision, with the State's Personnel Commission, which subsequently heard the appeal.

A Florida court remanded to the administrative hearing agent a request for a hearing on plaintiff's removal from the dean of education position.[136] In a Puerto Rican case, the court found that a faculty member was removed because of his national origin, not ineffective leadership. [137] The court ordered the faculty member reinstated and officials were enjoined from further harassment. In a Georgia case, the court found that because a researcher worked on a grant application the university is not obligated to retain the research assistant until the grant is completed.[138]

In an Arizona case, the court found that the institution could be held to a four-year verbal contract with the basketball coach.[139] The court noted that state law, which limits the contracting authority of certain state institutions to a one-year period, could not be relied on when the

133. Terrell v. University of Tex. Sys. Police, 792 F.2d 1360 (5th Cir. 1986).
134. Kline v. North Tex. State Univ., 782 F.2d 1229 (5th Cir. 1986).
135. Leiphart v. North Carolina School of The Arts, 342 S.E.2d 914 (N.C. Ct. App. 1986).
136. Tuckman v. Florida State Univ., 489 So. 2d 133 (Fla. Dist. Ct. App. 1986).
137. Vargas Figueroa v. Saldana, 646 F. Supp. 1362 (D.P.R. 1986).
138. Tidwell v. Emory Univ., 349 S.E.2d 245 (Ga. Ct. App. 1986).
139. University of Ariz. v. County of Pima, 722 P.2d 352 (Ariz. Ct. App. 1986).

tenure policy violated those provisions. Furthermore, the so-called "fiscal out" provisions could not be relied on, since the legislature has continued to fund the basketball position at the institution.

In a controversy involving the termination of the president of a state university, the federal district court remanded the case to the state court as the eleventh amendment barred subject matter jurisdiction.[140] In another case, the president's secretary did not have a property right in her continued employment requiring due process.[141] Even though the letter of appointment stated that "permanent employment" would be awarded after a probationary period was served, this contract was of unlimited duration and could be terminated at will unless prohibited by expressed limitations in the contact.

A black public safety officer who was dismissed for a charge of sexual harassment was able to support a claim of retaliation.[142] The plaintiff had filed a complaint with the Human Rights Commission when he was bypassed in a promotion decision. The evidence indicated that the plaintiff was dismissed for verbal sexual harassment while three white employees were only given a warning for sexual harassment which involved touching the victim.

The court found that the institution's grievance procedures satisfied due process requirements in the dismissal of a custodial employee and failure to file a grievance after termination constituted a waiver.[143] The head of a public safety office was dismissed for failure to perform the duties of the position. The court found the procedure for termination and the reason did not violate any constitutional guarantees.[144]

Collective Bargaining

In a Pennsylvania case, the employees' association challenged a state labor relations board ruling that the State System of Higher Education was the sole authority in the conduct of collective bargaining agreements with the thirteen public colleges and universities.[145] The court found that legislation creating the state system gave them sole authority in collective bargaining. In a third case involving authority to bargain, the city of Philadelphia claimed that the employees of a college were city employees where the city was named the trustee.[146] The controversy

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140. South Dakota Bd. of Regents v. Hoops, 624 F. Supp. 1179 (D.S.D. 1986).
141. Wright v. Cayan, 642 F. Supp. 947 (N.D.N.Y. 1986).
142. Loyola Univ. v. Human Rights Comm'n, 500 N.E.2d 639 (Ill. App. Ct. 1986).
143. Riggins v. Board of Regents of Univ. of Neb., 790 F.2d 707 (8th Cir. 1986).
144. Robinson v. Boyer, 643 F. Supp. 975 (N.D. Miss. 1986).
145. Board of Governors of the State Sys. of Higher Educ. v. Commonwealth, 514 A.2d 223 (Pa. Commw. Ct. 1986).
146. City of Philadelphia v. Local 473, 508 A.2d 628 (Pa. Commw. Ct. 1986).

centered on sick-leave payments as part of severance, agreed to in the college's collective bargaining agreement but prohibited by city code for municipal employees. Failure to repudiate the collective bargaining agreement earlier required acceptance of its provisions as claimed at bar.

A Michigan case raised the issue of what constituted chargeable fees for nonmembers.[147] The court found that bargaining unit expenses for organizing lobbying efforts germane to responsibilities as bargaining representative, and litigation related to duties as legal representative of employees, were found to be chargeable. A loan to another affiliated union was not chargeable. Also, the court found that the formula to assess the amount of chargeable dues paid to state (MEA) and national (NEA) umbrella organizations was defective as it pertained to chargeable and nonchargeable expenses.

An Ohio custodial union challenged the university's right to freeze hiring and then contract with an independent corporation for custodial services. The state supreme court had ruled that the contracts entered into while the institution was under a hiring freeze were illegal and must be nullified.[148] In this decision, the court found that contracts negotiated after the hiring freeze ended can be performed unless they are found to violate the current collective bargaining agreement.[149]

In California, the state supreme court overturned a lower court decision.[150] The court ruled that the medical staff participating in a residency program at the hospital were employees entitled to collective bargaining rights.[151] In another California case, the court ruled that allowing a union to display a banner on campus during an organization campaign would violate the prohibition of showing favoritism to one employee union.[152] The unions were provided space on campus to campaign, but allowing one union to use the designated banner display location would show favoritism.

Several cases involved grievances. In one case, the court upheld an arbitrator's authority to provide plaintiff with the opportunity to teach

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147. Lehnert v. Ferris Faculty Ass'n—MEA-NEA, 643 F. Supp. 1306 (W.D. Mich. 1986).

148. Local 4501, Communications Workers of Am. v. Ohio State Univ., 466 N.E.2d 912 (Ohio 1984).

149. Local 4501, Communications Workers of Am. v. Ohio State Univ., 494 N.E.2d 1082 (Ohio 1986).

150. See The Yearbook of School Law 1985 at 328, Regents of the Univ. of Cal. v. Public Employment Relations Bd., 205 Cal. Rptr. 49 (Ct. App. 1984).

151. Regents of Univ. of Cal. v. Public Employment Relations Bd., 715 P.2d 590 (Cal. 1986).

152. Regents of Univ. of Cal. v. Public Employment Relations Bd., 223 Cal. Rptr. 127 (Ct. App. 1986).

classes in math.[153] The plaintiff had grieved her reassignment from teaching to tutoring. However, the court would not uphold the arbitrator's award of damages since there was no financial loss. In an Illinois grievance case, the plaintiff's nutrition class was given to the department chair so she would have something to teach and plaintiff was declared unqualified to teach nutrition. The trial court ruled that the qualifications to teach a course were not an arbitratable issue. On appeal, the case was remanded for a decision on the merits since plaintiff did have a grievable issue.[154]

In a salary dispute, the Illinois court ruled that pay for a holiday was an inappropriate "dock" during an illegal strike.[155] The college could not count the holiday when it did not deduct Saturdays and Sundays in its formula to arrive at the "dock" amount. In termination disputes, courts in California and Illinois found that a faculty member's and a security guard's due process rights could not be bargained away in the provisions of a collective bargaining agreement.[156] Finally, a State Workers' Compensation Act did not shield the employer from a claim of intentional infliction of emotional distress, and material facts existed to require litigation.[157]

STUDENTS

Litigation brought by students is again diverse. Nonresident tuition cases continue to receive attention. Financial aid cases include loan defaults and cases surrounding the denial of veterans' benefits. Disciplinary dismissal cases continue to be active, while the courts continue to favor deference in academic dismissal litigation. First amendment litigation continues to cover the issues of free expression, free speech, and separation of church and state. Admission issues include a family dispute with a law school and a case against a tutoring service for those preparing to take standardized tests.

Admissions

A dispute between a family and a private university involved the denial of admission to three members of the family. In a series of

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153. Beaver County Community College v. Society of the Faculty, 513 A.2d 1125 (Pa. Commw. Ct. 1986).

154. Board of Trustees v. Cook County College Teachers, 487 N.E.2d 956 (Ill. Ct. App. 1985).

155. Alleva v. Board of Trustees of Belleville Area, 494 N.E.2d 1168 (Ill. Ct. App. 1986).

156. Phillips v. California State Personnel Bd., 228 Cal. Rptr. 502 (Ct. App. 1986); Pundt v. Millikin Univ., 496 N.E.2d 291 (Ill. App. Ct. 1986).

157. Walters v. President of Harvard College, 645 F. Supp. 100 (D. Mass. 1968).

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litigations, the three family members claimed that they were discriminated against in the admissions process because of their affiliation with causes of blacks and the activities of their father's law firm. Specifically, the plaintiffs alleged violations of 42 U.S.C. sections 1981, 1983, 1985, and 2000d, and the first and fourteenth amendments in the admissions process. In a series of opinions, in which there were obvious errors in the assignment of volume numbers at the time of publication in the reporter system, the court took the following actions. On February 10, 1986, the district court reviewed the case, analyzed the admissions process, and reviewed evidence on the retaliation claims. The court granted a summary judgment to the defendant institution, finding that the admission decisions were based on sound and fair procedures and free of bias.[158] In another action, the same plaintiffs alleged the same claims, previously litigated, while adding allegations of wrongful denial of their right to a grievance process. The district court found in an April decision that all the claims previously litigated were barred by the doctrine of res judicata.[159] The plaintiffs' claims under the equal protection clause and 42 U.S.C. section 1985 were sufficient to proceed with additional litigation on the issues.

The requirement that college students pass the Texas Education Agency's Pre-Professional Skill Test (PPST) before enrolling for more than six hours of professional education courses at any state college or university was challenged by an intervenor representing two sets of minority groups, one composed of elementary and secondary students and the other of college students who desired to take education courses. The group challenged this requirement because the passing rate for minority-group students who take the PPST is, on average, much lower than the passing rate for white students. The district court[160] issued a preliminary injunction requiring the Texas Education Agency to permit students who would have been qualified to enroll in education courses, but for their having failed the PPST, to do so. On appeal, the Fifth Circuit Court[161] found error in the lower court decision because it had not determined the validity of the test in measuring basic skills essential to satisfactory performance in teacher-education courses. The order for a preliminary injunction was reversed, and the intervenor's claims under the equal protection clause and title VI should proceed to trial on the merits.

In a related admission case, the Educational Testing Service (ETS),

158. Phelps v. Washburn Univ., 634 F. Supp. 556 (D. Kan. 1986).
159. Phelps v. Washburn Univ., 632 F. Supp. 455 (D. Kan. 1986).
160. United States v. Texas, 628 F. Supp. 304 (E.D. Tex. 1985).
161. United States v. LULAC, 793 F.2d 636 (5th Cir. 1986).

a nonprofit educational organization that prepares and administers numerous standardized tests used in admissions, was granted a preliminary injunction that enjoined a corporation which tutored students preparing to take standardized admission tests.[162] The injunction sought to stop the corporation from a wide range of activities involving ETS's tests and information. In 1982, ETS learned that a tutoring corporation had given to its clients "Math Level I" and "English Composition" Achievement tests that were stolen from ETS. However, this complaint contained no allegation of theft. ETS and the corporation entered into a written agreement to return all copies of the purloined tests, to refrain from copying or distributing any ETS-copyrighted or copyrightable materials, and to assist ETS if stolen material should come into the corporation's possession. In May of 1985, ETS claimed that the corporation used a "Math Level I" practice test which was copied from the same stolen test book used in 1982. ETS contends that defendant's actions constituted infringement of ETS's copyrights, breach of the 1983 agreement, and interference with "ETS's common law right to preserve the integrity of its testing program and the confidentiality of its secure test questions." On appeal, the Third Circuit Court[163] found that the similarity of questions used by the corporation substantiated the copyright violation claims and affirmed that part of the injunction. However, the part of the injunction on the breach of contract claim was reversed, and the claim was ordered to trial on the merits.

Nonresident Tuition

The plaintiff, whose parents were out-of-state residents, attended the University of Vermont for two years and applied for resident status for tuition purposes. Her application was rejected by the university's residency officer. Plaintiff appealed the decision to the university's appellate residency officer. After a hearing, at which plaintiff was represented by counsel, she received a written explanation of the denial. The plaintiff sought a declaratory judgment by the superior court on her residency status. The court granted the defendant's motion for summary judgment.[164] The plaintiff failed to raise substantial questions of law, and a review by the court of the university's quasi-judicial hearing required the filing of a writ of certiorari.

Another residential status case was decided in the Oregon Court of Appeals.[165] A student applied for resident status for tuition purposes.

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162. Educational Testing Servs. v. Katzman, 628 F. Supp. 527 (D.N.J. 1985).
163. Educational Testing Servs. v. Katzman, 793 F.2d 533 (3d Cir. 1986).
164. Molesworth v. University of Vt., 508 A.2d 722 (Vt. 1986).
165. Baillie v. State Bd. of Higher Educ., 719 P.2d 1330 (Or. Ct. App. 1986).

The application was denied because he received financial assistance from parents who did not reside in Oregon. The court of appeals found that the board may not deny in-state tuition to a student who is over eighteen solely because he receives financial support from nonresident parents without a determination of the student's actual bona fide residence. The case was remanded for a determination of plaintiff's residence.

Financial Aid

Financial aid benefits awarded by the Veterans Administration were the subject of litigation. The Veterans Administration sought to recover, as overpayments, educational assistance benefits paid to veterans who received failing grades in enrolled courses. The district court denied the plaintiff the right to recover.[166] On appeal,[167] the court of appeals reversed and held that the United States has a right to recover against veterans who receive educational benefits and then fail to earn grades which count for graduation, and that the veterans' due process rights would not be violated by United States' recovery of its overpayments.

An active-duty Marine officer sought judicial review of a Veterans Administration decision that educational benefits for full-time studies should be prorated to reflect his part-time enrollment.[168] The United States District Court for the District of Columbia dismissed the case and the officer appealed. The court of appeals, affirming the lower court decision, held that a constitutional challenge, not at issue in this case, remains the only justiciable basis on which to challenge Veterans Administration decisions on the allowance of veterans' benefits.

In another case, a Veterans Administration decision to disallow alcoholism, which is not part of a psychological disorder, as a valid reason to grant an extension of the time period to receive benefits was reasonable under the statute.[169] The court found the statute did not violate the Rehabilitation Act.

A veteran was notified that additional withdrawals from school would require corroborative statements from a doctor, employer, or school official to support subsequent awards of benefits. When the plaintiff requested copies of the regulations governing veterans benefits, he was given erroneous information which was subsequently corrected when the regulations were mailed to him. The court ruled that his claim under the Freedom of Information Act was moot, but costs incurred

166. United States v. Brandon, 601 F. Supp. 795 (W.D.N.C. 1985).
167. United States v. Brandon, 781 F.2d 1051 (4th Cir. 1986).
168. Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986).
169. McKelvey v. Turnage, 792 F.2d 184 (D.C. Cir. 1986).

prior to the correction of the error could be awarded.[170]

A number of cases involving defaulted student loans were filed in bankruptcy court. In several cases,[171] the court found that education loans were nondischargeable and the debtor failed to demonstrate undue hardship. However, in a Louisiana case,[172] the court remanded the case to determine which portion of the loan was used for educational purposes, as opposed to rent and food, in an attempt to determine which part of the loan was nondischargeable. Other cases dealt with procedural matters such as filing and payment requirements.[173] In a related case, the court on appeal found that the institution had provided adequate records to support its claim against an unpaid loan and the case was remanded.[174] In another related case, the court held that a third-party claim could not be brought against the university by a defaulting student.[175] The government won claims against two former education scholarship holders for a breach of a contract because they failed to provide agreed-to services after graduation.[176] In Virginia, the bankruptcy court ruled that the university could not withhold transcripts because of past-due accounts, because the policy contravened provisions of automatic stay of a student debtor under chapter 13.[177] An Illinois court held that loan funds designated to an individual but not yet distributed cannot be garnished.[178]

In New York, the court upheld an administrative decision by the Education Department to rescind certification and require repayment of tuition assistance grants from a business school.[179] The school had failed to uphold the certification requirements. The federal government was successful in a similar action involving a private seminary and financial aid assistance grants.[180] In South Carolina, the court found that a law providing tuition assistance to students attending nonprofit educa-

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170. Carter v. Veterans Admin., 780 F.2d 1479 (9th Cir. 1986).

171. *In re* Craig, 56 B.R. 479 (Bankr. W.D. Mo. 1985); *In re* Frech, 62 B.R. 235 (Bankr. D. Minn. 1986); *In re* Harrison, 60 B.R. 9 (Bankr. E.D. N.Y. 1986); *In re* Vretis, 56 B.R. 156 (Bankr. M.D. Fla. 1985).

172. *In re* Brown, 59 B.R. 40 (Bankr. W.D. La. 1986).

173. *In re* Klein, 57 B.R. 818 (Bankr. 9th Cir. 1985); *In re* Wilcox, 57 B.R. 479 (Bankr. M.D. Ga. 1985).

174. Administration of Tulane Educ. Fund v. Waters, 497 So. 2d 27 (La. Ct. App. 1986).

175. United States v. Olivarrieta, 632 F. Supp. 895 (S.D. Fla. 1986).

176. United States v. Bills, 639 F. Supp. 825 (D.N.J. 1986); United States v. Huebner, 644 F. Supp. 63 (W.D. Mich. 1986).

177. *In re* Parham, 56 B.R. 531 (Bankr. E.D. Va. 1986).

178. Telford v. Tice, 488 N.E.2d 308 (Ill. App. Ct. 1986).

179. Elmira Business Inst., Inc. v. New York State Dept. of Educ., 500 N.Y.S.2d 553 (App. Div. 1986).

180. Beth Rochel Seminary v. Bennett, 624 F. Supp. 911 (D.D.C. 1985).

tional institutions did not violate the equal protection of a student enrolled at a proprietary institution.[181] A community college was successful in its claim that a work-study student would not qualify for workman's compensation in Arizona.[182]

In the final case of this section, a student challenged the fee charged by a private contractor to process financial aid applications for the United States Department of Education.[183] The circuit court of appeals ruled that the fee did not violate the Higher Education Act of 1965, since the fee was used for the processing of data points which determine eligibility rather than for the processing of the application for aid.

First Amendment

Freedom of Speech. A Nebraska case leads off this section. The director of a theater of the arts on the campus of the University of Nebraska scheduled a controversial film which depicted the birth of Christ in a modern setting. After several complaints and political pressure from state senators, the director canceled the film. A complaint was filed in the federal district court against the university, the director of the theater, and others, alleging violations of constitutional rights.[184] The Court ruled that the university was immune from prosecution under the eleventh amendment, that the first amendment rights of those wanting to see the movie had been violated, and that the director of the theater could not be held liable for damages. The court reasoned that the state senators' actions made the cancellation an action of the state for an activity scheduled for a public forum.[185]

A professor and students of a law school requested a preliminary injunction against the Secretary of State of the United States. The motion sought to enjoin the Secretary from denying a permit to a representative of the Palestine Liberation Front from entering the country and speaking at a law school forum. The court found that the plaintiffs had not raised nonjusticiable political questions and that they were entitled to injunctive relief under the first amendment.[186]

In a Nebraska case, a privately owned student newspaper refused to print classified advertisements for roommates which contained information on the sexual orientation of the advertiser. The paper refused to print the gay and lesbian ads as a matter of editorial policy. The court

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181. Talley v. South Carolina Higher Educ. Tuition Grants, 347 S.E.2d 99 (S.C. 1986).
182. Pima Community College v. Arizona Dep't of Economic Sec., 714 P.2d 472 (Ariz. Ct. App. 1986).
183. Riggsbee v. Bell, 787 F.2d 1564 (Fed. Cir. 1986).
184. Brown v. Board of Regents of Univ. of Neb., 640 F. Supp. 674 (D. Neb. 1986).
185. *Id.* at 681.
186. Harvard Law School Forum v. Shultz, 633 F. Supp. 525 (D. Mass. 1986).

found that the rejection of the ads was a constitutionally protected editorial discretion of the newspaper which would be upheld even if the paper was subsidized with state money.[187]

Freedom of Expression. The decision in a denial of recognition of a gay and lesbian organization hinged on the chronology of *Gay Student Services v. Texas A & M.*[188] The plaintiffs sought damages for denial of recognition by the institution three weeks after the Supreme Court denied certiorari in this case. The Court found that the eleventh amendment immunities and the existence of a real controversy as regards recognition in the Fifth Circuit was enough to dismiss the claims against the institution.[189]

Freedom of Religion. A student enrolled in bible studies at a Christian college was denied financial assistance by the Washington Commission for the Blind. The state supreme court upheld the Commission decision denying assistance based on state laws which prohibit the use of state funds for religious purposes.[190] The Supreme Court[191] balanced the establishment and the free exercise clauses of the first amendment. They ruled that direct aid to the student would not establish or aid a religion, but that to deny plaintiff his vocational choice, bible study, would inhibit the student's free exercise of his religion. The judgment of the state supreme court was reversed.

Dismissal

Disciplinary Dismissal. After an investigation showed that two alumni had failed to meet the requirements for the awarded degree, the university notified the plaintiffs of the allegations and set a hearing date. Plaintiffs were not allowed to bring legal counsel to the hearing and failed to attend. The institution revoked their degrees. In an action seeking a declaratory judgment, the appellate court affirmed a lower court decision that the institution had no authority to revoke the degrees. The state supreme court, reversing the lower court, ruled that, based on just cause and the holding of a fair hearing, an institution had the

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187. Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986).

188. *See* The Yearbook of School Law 1986 at 269, 737 F 2d 1317 (5th Cir. 1984), cert. denied, 105 S. Ct. 1860 (1985).

189. Student Servs. for Lesbian/Gays v. Texas Tech, 635 F. Supp. 776 (N.D. Tex. 1986).

190. Witters v. Commission for the Blind, 689 P.2d 53 (Wash. 1984).

191. Witters v. Washington Dep't of Servs. for the Blind, 106 S. Ct. 748 (1986).

authority to revoke a degree.[192]

In Rhode Island, a student was sanctioned and subsequently suspended. The disciplinary action stemmed from controversies resulting from the plaintiff's participation in student government and his different attitude toward two staff members at the institution. Sanctions placed against the individual included a denial of participation in student government, an order to seek psychiatric treatment, and subsequently, suspension from the institution. The federal district court found that violations of plaintiff's due process existed, necessitating the reversal of all sanctions imposed or pending against the plaintiff.[193] The court found that an administrator at the institution exercised significant control over the three separate hearing boards so as to bias the outcome. The court also found that the plaintiff had a right to tape a hearing which could result in suspension. The court ordered a new impartial hearing on all of the charges.

A law student was injured when he was forced to exit his burning third-floor room through a window. Because of his injuries, he was disenrolled from the institution in good academic standing. Upon investigation of the fire, arson was suspected and the plaintiff was asked to either take a lie detector test or participate in a name-clearing hearing before reenrolling at the law school. The next academic year, the plaintiff, while not reenrolling, asked that a statement acknowledging his good academic standing with the law school be forwarded to another law school. The dean refused unless he was allowed to mention the allegations regarding the fire. The plaintiff sued, alleging deprivation of liberty and property rights and violations of due process, equal protection, and self-incrimination provisions of the Constitution. The court issued a summary judgment in favor of the law school dean.[194]

In a number of cases, the court found that the institutions' procedures did not violate the students' rights. In a previously litigated case,[195] the plaintiff was denied a rehearing based on a civil rights claim in his removal for plagiarism and cheating.[196] The plaintiff was also unable to maintain a claim that the requirements for the degree were eighty credits instead of eighty-one.[197] A New York court held that the institution's suspension of a student was not arbitrary or capricious,[198] while a

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192. Waliga v. Board of Trustees of Kent State Univ., 488 N.E.2d 850 (Ohio 1986).
193. Germain v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986).
194. Piccozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986).
195. *See* The Yearbook of School Law at 272. Easley v. University of Mich. Bd. of Regents, 619 F. Supp. 418 (E.D. Mich. 1985).
196. Easley v. University of Mich. Bd. of Regents, 632 F. Supp. 1539 (E.D. Mich. 1986).
197. Easley v. University of Mich. Bd. of Regents, 627 F. Supp. 580 (E.D. Mich. 1986).
198. Galiani v. Hofstra Univ., 499 N.Y.S.2d 182 (App. Div. 1986).

Georgia court upheld the procedures followed in the suspension of a student at a private college.[199] A federal district court found that a foreign medical school would be subject to the constitutional guarantees and state statutes of the state where its agent had an office.[200]

In the final case in this section, plaintiff brought charges against a private law school, the state bar examiners, and a psychiatric hospital. The claims covered numerous federal statutes, constitutional provisions, and state laws. The court denied all claims and noted that the receipt of student financial aid at a private law school would not yield a finding of state action.[201]

Academic Dismissal. The academic dismissal cases continue to defer to academicians for academic decisions. In the lead case, the Supreme Court refused to hear a case on appeal which involved the dismissal of a student from a Ph.D. program. After a long, protracted period between the approval of the proposal and substantive progress on the research project, the committee met three times with the plaintiff to review her progress to date. When plaintiff was unable to provide either research data or extraneous research notes on the project, the committee suspended her candidacy for the degree. The court found no violations of due process in the university's actions and found the courts ill-equipped to review subjective academic decisions.[202] In an Alabama case, the court reached a similar result but also ruled that allowing a student to commence dissertation research did not remove the requirement to pass a qualifying exam.[203] In a Minnesota case, a student failed two final oral exams, and the court found no violations in the denial of a request for a grievance hearing or the doctoral committee's actions.[204] A master's student's rights were not violated when she failed her final oral exam.[205] In a Colorado case, the placement in a student's file of a poor evaluation based on a low grade did not violate due process rights.[206]

A number of cases involved dismissal from professional schools. Several cases involved students dismissed from medical school residency programs for poor performance, and the courts found no viola-

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199. Life Chiropractic College, Inc. v. Fuchs, 337 S.E.2d 45 (Ga. Ct. App. 1985).

200. Kosta v. St. George's Univ. School of Medicine, 641 F. Supp. 606 (E.D.N.Y. 1986).

201. Martin v. Delaware Law School of Widener Univ., 625 F. Supp. 1288 (D. Del. 1985).

202. Mauriello v. University of Medicine and Dentistry of N.J., 781 F.2d 46 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 80 (1986).

203. Haberle v. University of Ala. in Birmingham, 803 F.2d 1536 (11th Cir. 1986).

204. Scholler v. University of Minn., 788 F.2d 510 (8th Cir. 1986).

205. Anchunsen v. University of P.R., 637 F. Supp. 426 (D.P.R. 1986).

206. Harris v. Blake, 798 F.2d 419 (10th Cir. 1986).

tions of due process.[207] Cases involving a dental student[208] and a nursing student[209] reached similar results concerning the students' claims, and confirmed the courts' reluctance to interfere with academic dismissal decisions and their refusal to acknowledge the existence of due process rights in these cases.

However, several cases did raise claims that had different results. A foreign medical student was dismissed for alleged, but unsubstantiated, poor performance in an internship program. The court found genuine issues which should be litigated on the student's claim of violations of equal protection and the deprivation of a liberty and property interest.[210] In Michigan, a state appeals court ordered that a case brought by a dismissed law student be remanded for trial.[211] The lower court had granted the university's motion for dismissal, based on evidence that a black student was dismissed after his overall grade-point average fell below a 2.0.

Other Constitutional Issues

A New York case raised questions regarding the rights of students to register to vote in the college community. The court held that the election commission rule, that the college dormitory was not a permanent and fixed residence, was an unconstitutional application of the state's election law.[212]

In another case, students were arrested in their dormitory room after they attempted to sell illegal substances to an undercover police officer.[213] The officer, invited into a dorm room by the occupants, did not need a warrant to make an arrest after witnessing a felony. The court noted that there was no reasonable expectation of privacy under these circumstances.

LIABILITY

Personal Injury

In a personal injury case involving a diving experiment, the plaintiff

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207. Lipsett v. University of P.R., 637 F. Supp. 789 (D.P.R. 1986); Mohammed v. Mathog, 635 F. Supp. 748 (E.D. Mich. 1986); Petock v. Thomas Jefferson Univ., 630 F. Supp. 187 (E.D. Pa. 1986).

208. Burke v. Emory Univ., 338 S.E.2d 500 (Ga. Ct. App. 1985).

209. Johnson v. Cuyahoga County Community College, 488 N.E.2d 1068 (Ohio C.P. 1985).

210. Banerjee v. Roberts, 641 F. Supp. 1083 (D. Conn. 1986).

211. Smith v. University of Detroit, 378 N.W.2d 511 (Mich. Ct. App. 1985).

212. Williams v. Salerno, 622 F. Supp. 1271 (S.D.N.Y. 1985).

213. State v. Dalton, 716 P.2d 940 (Wash. Ct. App. 1986).

alleged he suffered organic brain damage and emotional distress. The court granted a summary judgment in favor of the institution.[214] The experimentors had provided adequate information on known dangers and the plaintiff had signed a consent form. The court found the law governing ultrahazardous activities was not applicable in this case. In another case involving a training program, the court ruled in favor of the institution in a personal injury suit.[215] The court applied the doctrine of expressed assumption of risk when the student enrolled in the police training program. In a similar case, a student drowned while on a biology class field trip. The California Supreme Court reversed and remanded a case which was dismissed as untimely because plaintiff's attorney named the wrong public entity in his first claim and corrected it after the filing period had expired.[216]

Several cases resulted in the plaintiff becoming a quadraplegic. A student passenger in a jeep which overturned while traveling on a university service road sued the university. The court found that the service road, which was adequately posted as a service road and had a gate which someone left unlocked, was not a public roadway and the university was not negligent in maintenance or in the erection of barricades.[217] A university was not liable for an injury sustained in a lacrosse game where the sport was a club sport not subsidized by the university.[218]

Several cases involved injury from slipping on a wet surface. In one case, the state supreme court remanded a case because the plaintiff should have been allowed to present evidence of other accidents on the same stairs.[219] Those prior accidents, coupled with rain at the time of the plaintiff's accident, could have constituted a known dangerous condition obligating the defendant to corrective action. The request for a new trial on these issues was granted. In a New York case, the claims court accepted the plaintiff's late claim after she was injured when she slipped on a stairway at the City University of New York.[220] The court accepted the late claim because she had given prompt notice of her accident and had sought medical assistance when the extent of the injury became evident. However, the same court refused jurisdiction, as per the state code, in a similar claim against the Fashion Institute of Technology,

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214. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D. N.C. 1986).
215. Black v. District Bd. of Trustees of Broward Community College, 491 So. 2d 303 (Fla. Dist. Ct. App. 1986).
216. Bettencourt v. Los Rios Community College, 721 F.2d 71 (Cal. 1986).
217. Allemeier v. University of Wash., 712 P.2d 306 (Wash. Ct. App. 1986).
218. Hanson v. Kynast, 494 N.E.2d 1091 (Ohio 1986).
219. Goldstein v. C.W. Post Center, 504 N.Y.S.2d 734 (App. Div. 1986).
220. *In re* Crawford, 502 N.Y.S.2d 916 (Ct. Cl. 1986).

which is not part of the CUNY system but rather a community college under the Board of Education of the City of New York.[221] In Missouri, the court found sovereign immunity blocked a tort liability claim by a woman who slipped on a sidewalk at a lodge owned by the university, even though the lodge was operated in a proprietary way.[222]

In a Virginia case, the court refused the institution's request for a summary judgment.[223] The institution was not immune from tort liability under charitable immunity in a suit involving an injury sustained when a hatch was blown off a roof during a storm. Charitable immunity would be granted only where the education provided was free.

Consumption of alcoholic beverages was involved in several personal injury cases. Two cases involved fraternities. In a Pennsylvania case,[224] fraternity members leased a third party's home and purchased alcoholic beverages which were served to minors who attended the party. Minors who left the party intoxicated were involved in an accident which left one passenger dead. In this suit, the United States district court found that Pennsylvania law would not hold tenants liable who agreed to lease their premises but did not furnish alcoholic beverages. However, the law would not hold liable those who purchased or transported the alcoholic beverages to the party. Liability would be applied only to those who served alcoholic beverages to the minor driver.

In another case, a female student at an all-women's college spent the night in the room of a member of a fraternity on another campus.[225] After consuming alcoholic beverages in the man's room, the plaintiff was injured in an automobile accident while the male was taking her back to her dorm. The court issued a summary judgment in favor of both the institution and the fraternity, finding that the member's actions were those of an individual and not a function sponsored by either the institution or the fraternity.

A spectator, injured when a goalpost being pulled down at the end of the Yale Bowl football game struck her, brought a suit against the institution and the city and its police.[226] Summary judgment was granted to the institution on the plaintiff's public nuisance claim on the grounds that the stadium was private property to which the public was invited through the purchase of tickets. The city and its police were not granted a summary judgment on plaintiff's claim of a breach of material duties.

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221. Amato v. State, 502 N.Y.S.2d 928 (Ct. Cl. 1986).
222. Anderson v. State, 709 S.W.2d 893 (Mo. Ct. App. 1986).
223. Radosevic v. Virginia Intermont College, 633 F. Supp. 1084 (W.D. Va. 1986).
224. Fassett v. Poch, 625 F. Supp. 324 (E.D. Pa. 1985).
225. Campbell v. Board of Trustees of Wabash College, 495 N.E.2d 227 (Ind. Ct. App. 1986).
226. Cimino v. Yale Univ., 638 F. Supp. 952 (D. Conn. 1986).

Material facts require a determination of whether adequate crowd control was used during the incident.

A plaintiff, a rancher, alleged that he was defamed when a report concerning the death of his cattle was made public. The court refused to grant summary judgment in favor of the institution and remanded the case for trial.[227] The court found no support for the institution's claim that its internal report for a private party was subject to the state's Public Record Act because it was an official act.

Workers' Compensation

In a Louisiana case, the state supreme court reversed a summary judgment in favor of the university.[228] The court noted that material facts existed to require a determination of whether an injured custodial employee of a contracted cleaning service was eligible for unemployment compensation where the institution claimed that the contracted work was outside its principal trade or business.

In a Texas case, the court ruled on appeal that the workman's compensation claims survived plaintiff's death, which was unrelated to this claim, where they are accrued benefits and as yet unpaid.[229] The court drew a distinction between accrued and unaccrued benefits in reaching this ruling.

Contract Liability

In the lead case in this section, the University of Minnesota brought a claim of royalties and specific performance against a corporation and its licensees under a patent agreement. The controversy developed over alleged similarities between two heart valves and a legal ruling[230] on patent infringement in California. The court affirmed in part of the lower court ruling that the university was entitled to royalties as part of the patent agreement.[231] In a companion case, the federal circuit court denied the licensee's motion to enjoin the claim in the Minnesota state court and stayed the action before the federal district court pending resolution of the claims in Minnesota.[232]

A number of cases involved claims involving contracts for services.

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227. Neary v. Regents of Univ. of Cal., 230 Cal. Rptr. 281 (Ct. App. 1986).

228. Palmer v. Loyola Univ., 496 So. 2d 421 (La. Ct. App. 1986).

229. Simmons v. University of Tex. Sys., 706 S.W.2d 752 (Tex. Ct. App. 1986).

230. Washington Scientific Indust., Inc. v. Shiley Laboratories, Inc., 187 U.S.P.Q. 246 (1975).

231. Regents of Univ. of Minn. v. Medical Inc., 382 N.W.2d 201 (Minn. Ct. App. 1986), *cert. denied*, 107 S. Ct. 307 (1986).

232. Intermedics Infusaid v. Regents of Univ. of Minn., 804 F.2d 129 (Fed. Cir. 1986).

In one case, the university had failed to bill a federal agency for certain services performed under a contract. The court of claims ruled that the institution, under the Contracts Disputes Act, had presented its claim in a timely manner and denied the government's motion for dismissal.[233] In a New York case, the institution notified the telephone company that it would no longer accept financial responsibility for third-party calls made to campus numbers. The phone company made no effort to block third-party calls, a capability they possessd. The court ruled that the statute of limitations commenced tolling anew for each payment period where payment was refused. The case was dismissed because the statute of limitations had run out on all claims.[234] In Virginia, a photographer sued for copyright violations when the institution used copyrighted photographs in another publication without the photographer's permission. The court dismissed the case because the institution and its officials had raised a valid eleventh amendment immunity claim.[235]

Cases involving construction on campus also were before the court. In a New Mexico case,[236] the court found that minimum wage statutes did not apply to the installation of telecommunications equipment, since the statute specifically applied to the "construction, alteration, demolition or repair"[237] of buildings. In North Carolina, the contractor who installed a temporary, fragile roof was not responsible for damage caused by other contractors working on the roof which resulted in water damage inside the building.[238] The court noted that the warning to the owner of the building at the time the contractor completed the temporary installation and vacated the premises was sufficient. In another case, a contractor was not barred from bringing a claim in court for extras over and above the contract costs without seeking an administrative remedy.[239] In a Pennsylvania case, an institution was not allowed to proceed directly against a subcontractor.[240] In New York, the court applied strict liability to a contractor who installed defective panels used for certain walls of a building.[241]

Cases alleging breaches of lease agreements were also litigated. In Maine, a private institution's Board of Trustees decided that fraternities

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233. Board of Governors of Univ. of N.C. v. United States, 10 Cl. Ct. 27 (1986).
234. New York Telephone Co. v. State, 496 N.Y.S.2d 655 (Ct. Cl. 1985).
235. Richard Anderson Photography v. Radford Univ., 633 F. Supp. 1154 (W.D. Va. 1986).
236. Universal Communications Sys. Inc. v. Smith, 726 P.2d 1384 (N.M. 1986).
237. *Id.* at 1385.
238. E.L. Scott Roofing Co., Inc. v. State, 346 S.E.2d 515 (N.C. Ct. App. 1986).
239. Jones v. Iowa State Bd. of Regents, 385 N.W.2d 240 (Iowa 1986).
240. Manor Junior College v. Kaller's, Inc., 507 A.2d 1245 (Pa. Super. Ct. 1986).
241. Trustees of Columbia Univ. v. Exposaic Indus., Inc., 505 N.Y.S.2d 882 (App. Div. 1986).

were no longer within the mission and scope of the institution and removed institutional recognition. The court found that the institution had not breached the lease to a fraternity of a house it owned since fraternities must cease to exist on campus by board resolution.[242] In New York, a private institution could not terminate the lease of a tenant who was employed by another institution when the terms of the lease allowed for termination only when employment at N.Y.U. ceased.[243] Since the plaintiff was never an employee of N.Y.U., the termination provisions had no force.

The final case in this section involved a letter of admission to a medical internship program which set tuition at a certain amount.[244] Upon matriculation, the amount of tuition had been increased by the state legislature. The court ruled that there was no breach of contract where a disclaimer in the school catalogue stated that tuition charges were subject to change. Furthermore, the initial tuition amount stated in the letter did not represent a contractual obligation.

Deceptive Practices

The plaintiff alleged breach of contract, fraudulent misrepresentation, intentional infliction of emotional distress, and negligent infliction of emotional distress in a suit against a Caribbean medical school.[245] After paying application fees, tuition, and room and board and attending the institution for a short period, plaintiff found conditions to be inconsistent with the representation made by the school's agent in Miami. The court, at trial, awarded damages on the breach of contract claim but dismissed the other claims. On appeal, the state supreme court affirmed the lower court decision.

In a case involving alleged fraudulent misrepresentations in courses and instruction against a private institution in Iowa organized to teach transcendental meditation, the defendant institution presented a motion to grant blanket protection of "trade secrets."[246] The institution feared that the plaintiffs, who were now devoted followers of a competitor institution, would reveal secret techniques to the competitor, jeopardizing the defendant's business. The court granted a limited protection only to video and audio tapes, the identities of nonparties who participate in defendant's programs, and financial records of the institution. The requested blanket protection was denied.

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242. Chi Realty Corp. v. Colby College, 513 A.2d 806 (Me. 1986).
243. Cooper Union v. New York Univ., 500 N.Y.S.2d 984 (Sup. Ct. 1986).
244. Prusack v. State, 498 N.Y.S.2d 455 (App. Div. 1986).
245. Reimer v. Tien, 514 A.2d 566 (Pa. Super. Ct. 1986).
246. John Does I-VI v. Yogi, 110 F.R.D. 629 (D.D.C. 1986).

A Louisiana student who enrolled in a proprietary school alleged a breach of contract in the school's promise that the degree program was the equivalent to a two-year associate degree program transferrable to a four-year college. An appellate court affirmed the lower court decision, awarding damages in the amount of the tuition costs paid by the student.[247] The court found that the institution's misrepresentations required a refund of the total tuition charges regardless of the point at which plaintiff finally sued the institution.

In an Idaho case,[248] a student had enrolled in a course of study which the school bulletin stated would qualify the individual to enter the work force as a journeyman. Upon finding that the course would not qualify him as a journeyman, plaintiff sued alleging a claim under the tort claim act. The state supreme court, in an appeal from a summary judgment, affirmed that the claim could not be made under the tort claim act. The court granted the plaintiffs the right to amend their claim to a breach of contract claim within a specified time period.

Educational Malpractice

A plaintiff who suffered a stroke while having her neck manipulated by a chiropractor sued the chiropractor, the institution who certified him, and an oral contraceptive company whose medication she had been taking.[249] The chiropractor settled out of court; the lower court issued a summary judgment in favor of the institution in the educational malpractice claim; and the oral contraceptive claim went to a jury. In affirming the educational malpractice claim, the court cited previous case law[250] and stated four reasons for its decision. It refused the educational malpractice claim because: (1) there are no satisfactory standards of care; (2) there was inherent uncertainty in determining the cause and nature of any damage; (3) there would be an undue burden placed on educational institutions in the ensuing flood of litigation;[251] and (4) there would be blatant interference in the daily operations of educational institutions by the courts.[252]

Negligence

In a Utah case, a student alleged negligence in the supervision of a

247. Till v. Delta School of Commerce, Inc., 487 So. 2d 180 (La. Ct. App. 1986).
248. Wickstrom v. North Idaho College, 725 P.2d 155 (Idaho 1986).
249. Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).
250. *See* The Yearbook of School Law 1986 at 280, Swidryk v. St. Michaels Medical Center, 493 A.2d 641 (N.J. Super. Ct. App. Div. 1985).
251. *See* n.249, at 114.
252. *Id.* at 115.

field trip. The student was injured when she became intoxicated, wandered off, and fell from a cliff. The instructor had shown the students the area, warned them of hazards, and told them they were on their own after hours. The student consumed alcohol at a barbeque held for all the students at a local ranch and also in the back of a van driven back to camp by the instructor. The court found the university had no duty to protect the student from her voluntary intoxication nor to enforce the university code or the state law prohibiting consumption by minors.[253]

In a case involving an accident on a stairway, the court upheld a lower court decision finding the plaintiff negligent.[254] In a Florida case, the plaintiff was negligent when he went swimming in a lake and was injured by an alligator.[255] The plaintiff, a student, ignored signs in a university-owned recreation park which contained explicit warnings and prohibited swimming in the lake. In another case, the institution and the plaintiff were found to be 50% negligent.[256] The appellate court upheld the total damage award of $160,000 where the university's amount did not exceed the statutory limit of $100,000.

In both a defamation and negligence suit, an institution reported that a candidate for a public office had never attended a course as he had claimed. The institution, late in the election campaign, found that he had and publicly acknowledged its error. The appellate court affirmed that the institution had a valid sovereign immunity claim.[257]

ANTITRUST

In Idaho, a plaintiff brought action against the university and other parties when the university gave exclusive rights to the use of its Minidome for a trade fair to the Pocatello Chamber of Commerce.[258] Prior to that year, plaintiffs had sponsored a trade fair in the Minidome, the only facility of the type necessary for a trade fair in eastern Idaho. A summary judgment, emanating from an eleventh amendment bar to litigation, was granted to the university by the federal district court.

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253. Beach v. University of Utah, 726 P.2d 413 (Utah 1986).
254. Cotroma v. Johnson & Wales College, 501 A.2d 728 (R.I. 1985).
255. Palumbo v. Game & Fresh Water Fish Comm'n, 487 So. 2d 352 (Fla. Dist. Ct. App. 1986).
256. University of Tex. at El Paso v. Nava, 701 S.W.2d 71 (Tex. Ct. App. 1986).
257. Freeman v. Del Mar College, 716 S.W.2d 729 (Tex. Ct. App. 1986).
258. Ferguson v. Greater Pocatella Chamber of Commerce, 647 F. Supp. 190 (D. Idaho 1985).